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IN THE

Supreme Court of the United States

October Term, 1967

No. 1307

DALE BOAT YARDS, INC.,

Petitioner,

vs.

MABEL SZUMSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Petitioner, Dale Boat Yards, Inc., prays that a Writ of Certiorari issue to review the judgment of the New Jersey Supreme Court entered in the above-entitled cause on January 23, 1967.*

Citations to Opinion Below

The opinion on motion to dismiss ["Findings of the Deputy Director"] and the final administrative decision ["Determination of Fact and Rule for Judgment"] are unreported and are printed in the Appendix hereto, respectively at pp. 54a and 140a. The opinion of the County Court ["Determination of Facts and Judgment"] is unreported and is printed at p. 33a in the Appendix. The

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*The within cause is a companion case to *Hansen* v. *Perth Amboy Dry Dock Co.*, 48 N.J. 389, 226 A2d 4 (S. Ct. N.J., January 23, 1967) in which, the writer is advised, a Petition for a Writ of Certiorari is also being filed.

opinion of the Superior Court of New Jersey, Appellate Division, printed in the Appendix, p. 164a, is reported in 90 N.J.Super. 86, 216 A2d 256. The opinion of the Supreme Court of New Jersey, printed in the Appendix at p. 169a is reported in 48 N.J. 401, 226 A2d 11.

Jurisdiction

The Mandate on Reversal was entered by the New Jersey Supreme Court on January 23, 1967 (Appendix, p. 178a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

The federal questions sought to be reviewed were raised at the administrative level at the first opportunity, *viz.*, prior to hearing by motion to dismiss for lack of jurisdiction in the Division of Workmen's Compensation (Appendix, p. 46a). It was there held that the accidental death, although occurring on the high seas, was sustained by one who had only an incidental relationship to navigation and commerce and hence, was cognizable under either State or Federal jurisdiction (Appendix, pp. 58a, 59a).

The same questions were successively raised by Brief and argument on appeals to the County Court, the Appellate Division of the Superior Court and the New Jersey Supreme Court. In the County Court, it was held that the circumstances of the decedent's death placed the case within the "twilight zone" and that the local Division of Workmen's Compensation had jurisdiction (Appendix, p. 38a). The Appellate Division reversed, holding that the cause was ". . . not one within the 'twilight zone' doctrine formulated in *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1943). Whatever happened here happened on the high seas, and not at or near a dock, wharf or land establishment" (Appendix, pp. 165a-40). The Supreme Court of New Jersey again reversed, holding that

the "... decedent's dependents may apply for relief under our State Compensation Act regardless of the place of injury or the availability of a federal remedy" (Appendix, pp. 172a-34). Hence, jurisdiction was held to be in the local Division of Workmen's Compensation.

Questions Presented

(1) Where the death of a harbour-worker, and the events alleged to have caused it, all occur on the high seas, may Workmen's Compensation benefits validly be provided by State law under a "twilight zone" theory, or is the federal admiralty jurisdiction exclusive?

(2) Has *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L.Ed. 368 (1962) eliminated the need for a "twilight zone" by supplying a federal remedy for injuries which occur on navigable waters?

Constitutional and Statutory Provisions Involved

U. S. Constitution, Art. 3 § 2:

> "The judicial power [of the United States] shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."

The Longshoremen's and Harbour Workers' Compensation Act, 33 U.S.C. §§ 901-950; specifically 33 U.S.C. § 903(a):

> "(a) Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect to the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) Any officer or employee of the United States or any agency thereof or of any State or foreign government or of any political subdivision thereof".

The New Jersey Workmen's Compensation Act, R.S. N.J. 34:15-7, *et seq.;* specifically R.S.N.J. 34:15-7:

"When employer and employee shall, by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employeee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when the injury or death is intentionally self inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer".

Statement

The decedent, Anthony Szumski, was employed by the Dale Boat Yards, Inc., a corporation engaged in the maintenance, repair, storage and sale of pleasure craft with a principal yard and slips fronting on navigable waters at Bay Head, New Jersey.

The decedent reported to work daily at the Bay Head yard. He worked as a general "all around man" doing mechanical repairs, painting and occasional duties pertaining to the delivery of boats on land and on boats moored in slips. During the summer, 10% of his time was spent on the water.

On July 26, 1958, the decedent was assigned to aid in the delivery of a 26 foot pleasure boat. Because of some difficulty with a trailer, he was instructed to run the boat, by sea, from Atlantic Highlands, around Sandy Hook to Bay Head, a voyage of some 35 miles. . .

During the voyage, the motor failed. It was held that his unsuccessful efforts to start the motor contributed to his death, which took place on the "high seas", at a point off the coast of Point Pleasant, N. J.

The Division of Workmen's Compensation and the County Court held the decedent's activities were such that he fell within the "twilight zone" and jurisdiction was in the Division of Workmen's Compensation. The Appellate Division, reversed, noting that whatever occured here happened on the high seas and not at or near a dock, wharf or land establishment. The New Jersey Supreme Court reversed the Appellate Division, holding decedent to have been a "twilight worker" whose ". . . dependents may apply for relief under our State Compensation Act regardless of the place of the injury or the availability of a federal remedy".

Reasons for Granting the Writ

"One question left unanswered by the Court is whether state jurisdiction is to be limited in those cases which are on the borderline between state and federal authority. Under the 'twilight zone' theory, there is concurrent state and federal jurisdiction in that area where reasonable argument could be made either way. Because of this, state awards in a situation within the area of federal jurisdiction were not overruled. Since enlarged federal jurisdiction is now offered, there is no longer any need for a 'twilight zone', and consequently, no n ed to allow state intervention on the fringe of federal jurisdiction". 17 S.W.L.J. 345, 350.

The trend, both in federal case law and textual comment, has been toward a confinement of state jurisdiction to the original "water's edge" line and a concomitant expansion or protective extension of admiralty jurisdiction toward land. See *Calbeck* v. *Traveler's Insurance Co.;* The Twilight's Last Gleaming, 37 Tulane L.R. 79; *Interlake Steamship Company v. Neilsen,* 338 F2d 879 (Ct. of App. 6th Cir. 1964); see also *Michigan Mutual Liability Co.* v. *Arrien,* 344 F2d 641, 646 (Ct. of App. 2nd Cir. 1965); *Holland* v. *Harrison Bros. Dry Dock & Repair Yard, Inc.,* 306 F2d 369 (Ct. of App. 5th Cir. 1962); *Boston Metals Co.* v. *O'Hearne,* 329 F2d 504 (Ct. of App. 4th Cir. 4th Cir. 1964). Less uniformity is witnessed in state courts, *e.g., Arp* v. *Maryland Casualty Co.,* 170 So.2d 166 (Ct. of App. La. 1965); *Rice* v. *Uwharrie Council Boy Scouts of America,* 263 N.C. 204 (S. Ct. N.C. 1965). Indeed, the view has been expressed that injuries on navigable waters are not compensable under state Workmen's Compensation Acts under any circumstances. 31 Fordham L.R. 398; 76 Harvard L.R. 85; 41 N.C.L.R. 597, 603; and see *Atlas Iron and Metal Co.* v. *Hesser,* 177 So.2d 199 (Fla. S. Ct. 1965).

In the instant case, the New Jersey Supreme Court has decided not only contra trend but, indeed, has merely rearticulated and re-imposed the "local concern" theory specifically discussed and rejected in *Calbeck* v. *Travelers Ins. Co., supra.*

New Jersey is so situate that the rulings of its Courts materially affect the maritime industry in and about the vast ports of New York and Philadelphia. The direct impact of the holding below is to reimpose the uncertainty of remedy in these important commercial centers and to recreate a confusion in the application of the Longshoremen's and Harborworkers' Act on the one hand and the different Workmen's Compensation Acts of the tri-state area on the other hand.

If, as stated in *Calbeck* v. *Traveler's Ins. Co., supra,* it was intended that

> "no ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case . . .",

the within holding is directly contrary to the Congressional intent and the intent of this Court. See *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244, 86 L.Ed. 184, 62 S.Ct. 221 (1941) for a case factually identical.

CONCLUSION

By reason of the vast numbers of workmen and employees affected by this decision, as well as its direct conflict with cited decisions of this Court, it is respectfully urged that an important federal question is presented which merits the grant of a Writ of Certiorari.

Dated: April 13, 1967.

Respectfully submitted,

EDWARD B. MEREDITH,
Attorney for the Petitioner.

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Statement

The respondent Mabel Szumski urges denial of the petition for a Writ of Certiorari to review the judgment of the New Jersey Supreme Court entered on January 23, 1967.

Reasons For Opposing The Writ

The unanimous opinion of the New Jersey Supreme Court presents a complete analytical and historical review of the jurisdictional issue involved herein. The reasons upon which its conclusions were grounded are so thoroughly documented by authoritative decisions, we suggest we can add little which would be of further assistance to this court; thus we beg leave to rely upon the opinion of the court below and upon a fuller discussion of this problem in its unanimous decision in the companion case of *Hansen* v. *Perth Amboy Drydock*, 48 N. J. 389, 226 Atl. 2d 4 (Sup. Ct. of N. J. Jan. 23, 1967).

One of the essential reasons assigned by the court for its conclusions at bar was stated as follows:

> "Respondent has not suggested to us any material prejudice to the national maritime interest which might be caused by the application of our State remedy."

Despite this reference and the admonitory inference inherent in it, the petitioner still presents no facts nor offers any argument indicating any material prejudice to the characteristic features of the general maritime law or interference with the proper harmony or the uniformity of that law in its international or interstate relations.

Since the New Jersey Supreme Court has already determined there is no evidence sufficient to maintain the assertion there is such material prejudice, this factual conclusion should not be disturbed.

When Congress enacted the Longshoremen's and Harborworker's Act, 33 U.S.C.A. §§901-950 and provided

> "Compensation shall be payable under this chapter in respect of a disability . . . of an employee, but only if the disability . . . results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if the recovery for disability . . . through workmen's compensation proceedings may not validly be provided by State Law. . .*"

it clearly indicated its intention and approval that recovery for injuries on navigable waters of the United States, could be validly provided by State law.

Despite some early doubts concerning the delegation of authority by Congress to the States, to enact legislation for compensation to workmen whose injuries occurred on navigable waters, this Court enunciated, approved and adopted what came to be known as the "twilight zone" doctrine.

This included not only the specific locale of an accident but the nature of the work done; thus where an injured workmen's duties were primarily of local concern and not directly involved with commerce on navigable waters, recovery for compensation under the provisions of the individual State acts, was approved.

This demonstrated the Court's intention to insure a forum for recovery by injured workmen in what frequently appeared to be a questionable area concerning Federal or State jurisdiction.

The New Jersey Supreme Court concurring with the courts of last resort of many other jurisdictions and with

decisions of this Court, cautioned that we should not confuse "the availability of Federal jurisdiction with its exclusiveness."

If we hold simply because an accident occurs on navigable waters, that all States are precluded from promulgating any legislation in connection therewith, it would frustrate, nullify and render meaningless the expressed Congressional intention of the Longshoremen and Harborworker's Act, 33 U.S.C. §§901-950. Section 3 (a) of the Act, 33 U.S.C. §903 (a) reads:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.*"

These provisions should be accorded meaningful interpretation and effective implementation.

In *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114, 82 S. Ct. 1196 (1962) the Court held:

> "We turn finally to a question raised only in Donovan v. Avondale Shipyards. The employer contends that the employee accepted benefits under the Louisiana State Compensation Act and that this constitutes an election of remedies which bars prosecution of his claim under the Longshoremen's Act. Compensa- Act without a prior administrative proceeding. Before the federal claim was filed Avondale made payments to the employee for some two years and three months at the maximum rate provided by the Louisi-

ana statute. The employee accepted the checks which bore a notation on their face that they were payments of compensation under the state act. In addition Avondale advanced a substantial sum to the employee to be credited against future compensation payments. Avondale also paid medical expenses for the employee's account in excess of the maximum liability imposed by the Louisiana statute. In the compensation order entered by Deputy Commissioner Donovan under the Longshoremen's Act the full amount of all payments made by the employer was credited against the award, and no impermissible double recovery is possible. We hold that *the acceptance of the payments does not constitute an election of the remedy under state law* precluding recovery under the Longshoremen's Act. Nothing in the statute requires a contrary result. And we agree that *the circumstances do not support a finding of a binding election to look solely to the state law for recovery. Massachusetts Bonding & Insurance Co.* v. *Lawson,* 149 F. 2d 853; *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne,* 192 F. 2d 968; *Western Boat Building Co.* v. *O'Leary,* 198 F. 2d 409."

The foregoing recognized and approved an election of remedies provided by the Federal and State jurisdictions; if the Federal remedy was exclusive and State jurisdiction pre-empted, there could be no such election.

The United States Constitution, Article III, §2 provides:

"The judicial power (of the United States) *shall extend* . . . to all Cases of admiralty and maritime Jurisdiction . . ."

Nothing contained therein expressly limits such jurisdiction to the Federal Courts; it makes no provision that such jurisdiction shall be exclusive nor denies to the individual States the authority to enact effective jurisdictional legislation.

In short while the Federal judicial power *extends* to all cases of admiralty and maritime jurisdiction, it doesn't usurp it.

This, in view of the approval by the United States Supreme Court of the "twilight zone" doctrine as enunciated in *Davis* v. *Department of Labor & Industries,* 317 U. S. 249, 63 S. Ct. 225 (1942) fortifies our contention that while nothing provided by any State law may impair, infringe or curtail the authority of the Federal courts, to exercise its judicial power in all cases of admiralty or maritime jurisdiction, where such jurisdiction is invoked, the States are not pre-empted from providing compatible remedies.

If *arguendo* it be contended the respondent's remedy is governed solely by the Longshoremen and Harborworker's Act *supra,* we submit her husband, the late Anthony Szumski was precluded from its provisions.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950; 33 U.S.C. §903(a):

> "(a) Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect to the disability or death of

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) Any officer or employee of the United States or any agency thereof or of any State or foreign government or of any political subdivision thereof."

Szumski was never hired to load or unload any vessel over eighteen tons. Indeed he did no loading or unloading at all, and if his attempt to start the motor which stalled constituted *repairs* then clearly he was repairing a "small vessel under eighteen tons net" (see Exhibit R-1 (156a)).

If the Longshoremen and Harborworker's Act by its expressed provisions excluded Szumski from its application and the State Compensation Laws may not be invoked, the respondents would find themselves in that very vacuum which the United States Supreme Court and Congress intended should not exist.

CONCLUSION

For the reasons hereinabove stated and upon the authority of the decision cited by the New Jersey Supreme Court in its companion case, *Hansen* v. *Perth Amboy Dry Dock Co., supra*, we urge this court to deny the petition for Writ of Certiorari.

Respectfully submitted,

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